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Supreme Court of the United States

October Term, 1897.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,

Appellant,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, INTERVENING PETITIONER,

Appellee.

Petition for Writ of Certiorari

TO

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BLODGETT WILSON AND
PHILIP BARTON WILSON,
Solicitors for Petitioner.

Supreme Court of the United States

October Term, 1897.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,
Appellant,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, INTERVENING PETITIONER,
Appellee.

Petition for Writ of Certiorari.

To the Supreme Court of the United States of America:

The petition of C. H. Bosworth, Receiver of the Chicago, Peoria & St. Louis Railway for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, under the provisions of Section 6 of the Act of Congress, approved March 3d, 1891, and ordering that the records in a certain appeal be certified to this honorable court for its review and determination. Said appeal is entitled as follows: "C. H. Bosworth, Receiver of the Chicago, Peoria & St. Louis Railway, *Appellant*, vs. Terminal Railroad Association of St. Louis, Intervening Petitioner, *Appellee;* No. 367; October Term, 1896;

United States Circuit Court of Appeals, for the Seventh Circuit."

Statement of the Case.

Your petitioner thereupon respectfully shows to this honorable court, as follows:

That on the 21st day of September, 1893, the Mercantile Trust Company of New York, filed its bill of complaint in the United States Circuit Court for the Southern District of Illinois against the Chicago, Peoria & St. Louis Railway Company, praying a foreclosure of its mortgage, and the appointment of a receiver *pendente lite*. Thereafter, on the same day, an order was entered on the said bill of complaint, appointing C. H. Bosworth and E. Ellery Anderson receivers of the railroad and property of the said Chicago, Peoria & St. Louis Railroad Company, clothing them with all the authority and rights usually given to receivers by courts of equity to take charge of and operate railroads and the general administration of the same for the benefit of the mortgage bondholders.

Among other things, this order contained a direction to the receiver to collect and receive the tolls, rents, moneys, issues and profits of said premises and property, and out of the same equip, maintain and keep the property in good repair and pay, among other things (R. p. 25):

> "Fourth: All claims for materials and supplies which have been incurred in the operation and maintenance of

> said property during the six months last passed, and all ticket, trackage and traffic balances due from connecting railroads. To which last item, number four, counsel for the Mercantile Trust Company, trustee, objects, and which objection the Court, upon argument, overrules."

On the 27th day of May, 1895, the Terminal Railroad Association of St. Louis filed its intervening petition in this foreclosure cause, and alleged that within the six months prior to the appointment of the receivers, it performed certain labor and furnished certain materials for and to the defendant railway company, amounting in value to the sum of $8,162.11, and prayed that the same "be allowed and ordered to be paid under the order of this Court (Circuit) heretofore made herein, directing the payment by the receivers of debts incurred by said Chicago, Peoria & St. Louis Railway Company within six months prior to the appointment of the receiver." (R. p. 26.)

To this intervening petition the receivers, on June 8th, 1895, filed their answer (R. p. 28), first saving all benefit and advantage of exception to the errors, uncertainties and imperfections in the petition, and then averred that the facts set forth in the petition might be true, but that they were utter strangers to the same and could not form any belief thereon. And further answering, the receivers denied that the petitioner was entitled to the relief or any part thereof demanded, and prayed the same advantage of their answer as if they had pleaded or demurred to the petition.

The said intervening petition, under a general order of reference (not made, however, by consent of the parties), went to Stuart Brown, as master in chancery, and he, after hearing certain evidence, made and filed his report on January 6th, 1896, wherein and whereby he reported that he had examined the petition and answer, had taken evidence, and thereupon found that there was due the petitioner, for labor and material furnished, the sum of $8,162.11, and that such sum was a lien on the property of the defendant company, prior and superior to the claim of the mortgage bondholders, and that it should be paid out of the surplus income, *or from a sale of the property.* (R. p. 29.)

To this report the receiver, on the 29th day of January, 1896, filed his exceptions (R. p. 30), and these exceptions were thereafter, on the 30th day of July, 1896, overruled by the Circuit Court, and a decree entered on the petition in conformity with the report of the master. (R. p. 31.)

The said decree directed the receiver to pay to the intervener the sum of $8,162.11, out of the income of the receivership, if any such income was in his hands, and in case he had no funds in hand for this purpose, *directed that the same be paid out of the proceeds of the sale of the mortgaged premises*, in preference to the mortgage debt. (R p. 32.)

From this decree the receiver prayed and obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and to that end filed the following petition and assignment of errors, to-wit:

Petition for Appeal.

"The petition of C. H. Bosworth, receiver herein, showeth unto Your Honor that a final decree was rendered in the above entitled cause on the 30th day of July, 1896.

Whereby it was ordered, adjudged and decreed that your petitioner should pay over to the said Terminal Railroad Association, of St. Louis, the sum of $8,162.11.

"Your petitioner further states to Your Honor that he has assigned errors upon the record in said cause, specifying errors, as he alleges, in the record and judgment aforesaid. He therefore prays that your Honor will grant an appeal from the said judgment and decree, to your petitioner, upon condition that he enters into bond in the sum of $500, with surety to be approved by this Honorable Court, in such time as Your Honor shall order and decree."

Assignment of Errors.

"And now comes C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his solicitors, and says there is manifest error in the record and proceedings in the above entitled judgment and decree, and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness.

4. The court erred in failing and refusing to order, adjudge and decree that the claim of the intervener was not entitled to a lien prior to that of the mortgage bondholders on the mortgaged premises of the defendant railway company.

5. The court erred in ordering, adjudging and decreeing the said C. H. Bosworth, as receiver, to pay to the intervening petitioner the sum of $8,162.11, with interest from said date, together with the costs in this case.

6. The court erred in ordering, adjudging and decreeing that the said intervener be paid the sum of $8,162.11 out of the proceeds of the sale of the mortgaged premises of the defendant railway company ahead of the mortgage debt.

Whereby, the plaintiff in error prays that the judgment and decree be reversed and annulled. ''

Thereupon the said Circuit Court for the Southern District of Illinois entered an order allowing said appeal, which order is as follows:

Order Allowing Appeal and Approving Bond.

"Now on this 18th day of November, 1896, the same being one of the days of the June term, A. D. 1896, of this court, comes C. H. Bosworth, receiver herein, and files his petition for appeal from the order and decree of the court entered herein on the 30th day of July, 1896; and it appearing to the court that said petition is in due form, it is hereby ordered, adjudged and decreed that the prayer of said petition be, and the same is hereby granted; that the appeal be, and the same is hereby allowed the said C. H. Bosworth, receiver, from said order and decree of July 30th, 1896, to the United States Circuit Court of Appeals for the Seventh Circuit, upon the said C. H Bosworth, as such receiver, entering into bond in the sum of $500, with surety to be approved by this court, which bond, it appears to the court, is herewith submitted and approved."

The said appeal having been thus allowed, came on for hearing in said Circuit Court of Appeals before their honors, Judges Woods, Showalter and Jenkins, and was fully argued in said court, and subsequently, on the 7th day of June, 1897, the said Circuit Court of Appeals handed down its decision, wherein and whereby the said appeal was dismissed

on the ground that the receiver *had no right to appeal* from the decision of the Circrit Court, a copy of which opinion is attached to the transcript of record certified to this court.

That thereafter, on or about the 25th day of June, 1897, your petitioner, as appellant, filed his petition in said Circuit Court of Appeals for a rehearing, which petition was subsequently on or about the 6th day of October, 1897, by said Court of Appeals overruled, and which petition is also attached to the transcript of record certified to this honorable court.

Your petitioner further respectfully represents that the meritorious question presented to said Court of Appeals, by said appeal, was as to the right to displace vested contract liens in favor of unsecured creditors, in railroad foreclosures, where there had been no diversion of income; that the decision of the Circuit Court from which said appeal was prosecuted is at variance with decisions of this Honorable Court and with certain Circuit Courts of Appeal, and that the same involves a grave and important question of law, about which there is much conflict in the decisions of the Circuit Courts of the United States and of the several United States Circuit Courts of Appeals.

Your petitioner further respectfully represents that the decision on the question of practice rendered by said Court of Appeals is at variance with the decision

of this Honorable Court as well as with the decisions of the Circuit Courts of Appeals for the Fourth and Sixth Circuits; that the errors made therein can only be authoritively corrected in this Honorable Court; and as to the matters so at variance, as well as to divers other matters, the said decision of the said Circuit Court of Appeals for the Seventh Circuit contains manifest errors of law; and that the matters as to which the said Court of Appeals has adjudicated adversely to your petitioner, and more particularly the matters as to which said decision is in conflict with the decision made by the Circuit Courts of Appeals for the Fourth and Sixth Circuits, and the law announced by this Honorable Court, are matters irreparably injurious to your petitioner, and the estate he is administering as receiver.

Your petitioner further respectfully represents that the decision rendered by said Court of Appeals involves a most important and far-reaching question of practice to all litigants in railroad foreclosures, and that by reason of the conflict of decisions between the Circuit Courts of Appeals in the Fourth and Seventh Circuits, it is the province of this Honorable Court to harmonize and correct the same.

Assignment of Variance.

First.

The decision of the Court of Appeals for the Seventh Circuit is at variance with the decision of the Court of Appeals for the Fourth Circuit in this: That in the case at bar the court says:

> "By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it. He has no such right. He is, in so doing, an interloper obtruding himself in breach of his duty where he has no right, and in a matter with which he is not concerned."

While in *Thom vs. Pittard, 10 C. C. A., 352*, the Court of Appeals for the Fourth Circuit says:

> "It is claimed that the receiver, the officer and servant of the court, subject to its orders, without personal interest in the funds under his control, which are to be accounted for as the court may direct, is not to be permitted to refuse to obey the court's orders by appealing from its decrees. But we must remember that the receiver represents all the parties in interest. He stands for the railroad company as well as for all persons having claims against it, and he speaks for the bondholders as well as for the stockholders. While he has no personal interest in the proceedings, except to faithfully and impartially discharge his duties, it is incumbent upon him to faithfully protect the property confided to his keeping; to report to the court all matters connected therewith relating to its safe keeping, and *proper disposition*; to obtain permission to sue for debts due, and leave to pay claims owing by him. *Permission given the receiver to sue, or direction to him to defend, should take with it the right to follow the suit to the court of last resort.*"

Second.

The decision of the Court of Appeals for the Seventh Circuit is at variance with the decision of the Court of Appeals for the Fourth Circuit in this:

That in the case at bar the court says:

> "Neither the trustee, nor the bondholders, nor the purchaser is here objecting; who made the receiver the guardian of their interests in this regard?"

While in *Thom vs. Pittard, 10 C. C. A. 352*, the Court of Appeals for the Fourth Circuit says:

> "But we must remember that the receiver represents all the parties in interest. He stands for the railroad company as well as for all persons having claims against it, and he speaks for the bondholders as well as for the stockholders."

And again, in the latter the court says:

> "While it is true that any of the defendants to said chancery suit, interested in the property of the railroad company, *and in its proper distribution*, as also the plaintiffs, *could have appealed* from said decree in favor of appellee, proper steps therefor having been taken, *still it does not follow that the receiver, who was in fact the defendant*, so far as the issues raised by the petition were concerned, *could not also appeal.*"

Third.

The decision of the Court of Appeals for the Seventh Circuit is at variance with the decision of the Court of Appeals for the Sixth Circuit in this:

That in the case at bar the court says:

> "By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it. He has no such right. He is in so doing an interloper, obtruding himself in breach of his duty where he

has no right, and in a matter with which he is not concerned."

While in *Felton vs. Ackerman, 9 C. C. A., 457*, the Court of Appeals for the Sixth Circuit says:

"While it is true that the receiver is an arm of the court in the administration of the property, yet, where persons intervene to obtain relief against him, because they cannot obtain full relief in any other forum, the issued raised by his answer to the petition makes the proceeding an adversary one, in which the receiver *represents the interests of the owners of the property*, of which he is temporarily in charge. If, *as such representative*, he feels aggrieved by an order of the court made in an adversary proceeding of this character, it is difficult to see why he should not be permitted to have the order of the court reviewed by the appellate tribunal to which any other litigant may resort. Certainly the owners of the property, if aggrieved by the order against the receiver, *might appeal, and there would seem to be no justice in preventing the temporary custodian of their property from doing so.*"

Assignment of Error.

First.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he had no interest in the controversy, for the reason that the intervening petition prayed relief against the said Bosworth, and the issue raised by the answer thereto made the proceeding an adversary one, in which the said Bosworth represented the interests of whomsoever might be ultimately adjudged to be entitled to the estate of which he was temporarily in charge as such receiver.

Second.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he had no right to appeal from the decree of the Circuit Court for the Southern district of Illinois, for the reason that the said Circuit Court expressly authorized and directed the said Bosworth to prosecute said appeal.

Third.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he had no right to appeal, for the reason that it is incumbent upon him to carefully protect the property confided to his keeping as receiver, and the right to sue or defend carries with it the right to follow the suit to the court of last resort.

Fourth.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he had no interest in the controversy, for the reason that the said C. H. Bosworth, as receiver, represents all the parties to the original foreclosure cause, as against the parties who may attempt, by a separate and distinct action, to diminish and segregate the estate which he was appointed to conserve.

Fifth.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on

the ground that he did not represent the parties to the original foreclosure cause as against the Terminal Railroad Association, a stranger thereto, attempting to diminish and segregate the estate in controversy between the parties to the original cause.

Sixth.

The Court of Appeals for the Seventh Circuit erred in deciding that the receiver represented the Terminal Railroad Association as well as the mortgagee in the protection and safe keeping of the income of the receivership and the property in controversy between the parties to the original foreclosure cause.

Seventh.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that *prima facie* the mortgagee was entitled to the property in litigation and to the income of the receivership, and that, as to the protection and safe keeping of the same, the receiver represented the mortgagee as against the Terminal Railroad Association.

Eighth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the receiver, in the care and custody of the property, represented solely the parties to the original foreclosure cause, until some other party by intervention acquired a substantial, prior or equal right therein by a final adjudication in a court of last resort.

Ninth.

The Court of Appeals for the Seventh Circuit erred in concluding it to be conceded that the debt in controversy was a just claim against the *estate* from the statement in appellant's brief that there was "no controversy as to the labor having been performed or the material furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same," for the reason that such language can only be construed to concede the claim to be just as against the defendant railway company.

Tenth.

The Court of Appeals for the Seventh Circuit erred in assuming as the basis for its judgment "that prior to the decree appealed from, the railway had been sold under decree of sale and has passed out of the possession of the receiver and into the possession of the purchaser, and also that the receiver had not in hand moneys with which to pay the debts adjudged," for the reason that the record in the cause is wholly silent as to such facts.

Eleventh.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to reverse and annul the decree of the Circuit Court for the Southern District of Illinois.

Twelfth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that before the Terminal Railroad Association was entitled to have its claim paid out of the income of the receivership it should allege and prove that the income arising from the current earnings of the railway company was diverted from the payment of current expenses to the payment of the mortgage debt.

Thirteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that before the Terminal Railroad Association was entitled to have its claim paid out of the proceeds of the sale of the mortgaged premises, ahead of the mortgage indebtedness, it should allege and prove that the net income arising from the operation of the property by the receiver, after paying all necessary operating expenses, was applied to the betterment of the mortgaged property.

Fourteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that even if there had been such a diversion of the income arising from the current earnings of the railway company, or from the current earnings of the receiver, the amount of restoration depends upon the amount of diversion, and before the Terminal Railway Association was entitled to have its claim paid out of either the income

of the receivership or the proceeds of the sale of the mortgaged premises, it should have alleged and proved that the amount so diverted aggregated at least the amount of its claim.

Fifteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railroad Association had neither alleged nor proved that the income arising from the current earnings of the railway company was diverted from the payment of current expenses to the payment of the mortgage debt, principal or interest.

Sixteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railroad Association had neither alleged nor proved that the net income arising from the operation of the property by the receiver was diverted to the betterment of the mortgaged property.

Seventeenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railroad Association had neither alleged nor proved that the mortgage bondholders had received that which in equity belonged to the general creditors of the railway company.

Eighteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railway Association relied wholly, for its right of recovery, on the order appointing the receiver, directing him to pay certain claims; and in failing and refusing to decide that such order alone is not a sufficient ground of recovery.

A certified copy of the transcript of the record in this case is herewith filed as a part of this application for the Writ of Certiorari.

Whereupon your petitioner respectfully prays that this honorable court will be pleased to grant a Writ of Certiorari requiring the case entitled, "C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis Railway, appellant, vs. Terminal Railroad Association of St. Louis, intervening petitioner, appellee. No. 367. United States Circuit Court of Appeals for the Seventh Judicial Circuit," to be certified to this Honorable Court for its review and determination.

C. H. BOSWORTH, *Receiver*,
Chicago, Peoria and St. Louis Railway.

BLUFORD WILSON and
PHILIP BARTON WARREN,
Solicitors for Petitioner.